

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MICHAEL J. TALLEY and	)	
SUSAN TALLEY, husband	)	
and wife,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 05C-08-311-PLA
v.	)	
	)	
TRI-STATE WASTE SOLUTIONS,	)	
INC., a Delaware corporation, and	)	
GEORGE T. COLLINS, SR.,	)	
	)	
Defendants.	)	

UPON CONSIDERATION OF DEFENDANTS' MOTION  
IN LIMINE TO PRECLUDE PLAINTIFFS' EXPERT  
**DENIED**

Submitted: June 14, 2007

Decided: June 26, 2007

This 26<sup>th</sup> day of June, 2007, it appears to the Court that:

1. On March 3, 2004, Michael J. Talley was operating a motorcycle and traveling eastbound on Nottingham Road approaching the intersection of Jackson Hall Road. A trash-hauling truck, owned by Tri-State Waste Solutions, Inc. and operated by George T. Collins, Sr. (collectively "Defendants"), was traveling westbound on Nottingham Road and was preparing to make a left turn onto Jackson Hall Road. Mr. Collins

began to initiate the truck's left turn, unaware of Mr. Talley's approaching motorcycle until it was too late. The motorcycle collided with the truck. Mr. Talley suffered severe injuries, including the amputation of a leg. Mr. Talley and his wife, Susan Talley, (collectively "Plaintiffs") subsequently filed this action against the Defendants.<sup>1</sup>

2. To support their claims, Plaintiffs offer the opinions of their expert, Frank M. Costanzo, who is employed by Accident Cause & Analysis. For this case, Mr. Costanzo performed an accident reconstruction and composed a "Collision Reconstruction Report" wherein he concluded the following: Prior to the accident, Mr. Talley was traveling approximately 41 miles per hour; Mr. Collins' failure to yield to Mr. Talley's "clearly visible" motorcycle before starting his left turn was the sole cause of the collision; Mr. Collins' forward sightline toward Mr. Talley's approaching motorcycle was approximately 1500 feet; and Mr. Talley did not have sufficient separation distance between his motorcycle and Mr. Collins' turning truck to stop his motorcycle before the collision and, in fact, Mr. Talley barely had enough distance to complete his perception/reaction phase, which resulted in a "no escape" collision scenario.<sup>2</sup>

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<sup>1</sup> See Docket 2. "Docket [#]" refers to the number assigned by LexisNexis File & Serve.

<sup>2</sup> See Docket 72, Ex. B.

3. Defendants have now filed a motion in limine seeking to preclude Mr. Costanzo from testifying at trial regarding Mr. Talley's speed. Specifically, Defendants contend that Mr. Costanzo's opinion that Mr. Talley was traveling at 41 miles per hour before, during, and after the impact, is not a "good fit" with the evidence and is unreliable due to its failure to be "sufficiently tied" to the specific facts of this case. Defendants argue that Mr. Costanzo's speed opinion is at odds with Mr. Talley's and two witnesses' testimonies that the brakes on the motorcycle were applied before impact, and is not consistent with the fact that Mr. Talley's speed would have been slowed considerably upon impact. Therefore, according to Defendants, because Mr. Costanzo's opinions are unsupported by the evidence, he should be precluded from testifying that the speed of the motorcycle was the same before, during, and after the impact as such testimony would create unfair prejudice and would mislead the jury.<sup>3</sup>

4. Defendants further contend that Mr. Costanzo's testimony should be precluded regarding Mr. Talley's speed as calculated by Mr. Costanzo's use of the coefficient of friction. Defendants assert that Mr. Costanzo's use of the coefficient of friction to determine speed is troublesome because he did not consider the period of time that Mr. Talley's

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<sup>3</sup> See Docket 64.

motorcycle was on the grass rather than on the paved road. Therefore, Defendants maintain that Mr. Costanzo should not be permitted to testify as to Mr. Talley's speed based on the coefficient of friction as such testimony would be confusing to jurors.<sup>4</sup>

5. Plaintiffs respond by insisting that Mr. Costanzo should not be precluded from testifying as to Mr. Talley's speed. As support, Plaintiffs state the following: Mr. Costanzo testified that no pre-impact skid marks (indications of braking) were observed leading to the point of impact and, as such, he could not calculate how much speed, if any, was dissipated by pre-impact braking; Mr. Talley never testified as to the time or distance of his braking; David Derrickson (witness) who, according to Defendants, saw Mr. Talley braking, was not definitive in his testimony and did not know for sure whether Mr. Talley was braking; Mr. Derrickson has credibility issues since he is employed by Tri-State Waste Solutions and is related by marriage to Mr. Collins; and Defendants have laid no foundation for Timothy Stoeckle's (witness) testimony and supposed knowledge that "fishtailing" is an indication that the rear brakes have been applied. Plaintiffs also point to Mr. Costanzo's testimony that he assumed that Mr. Talley traveled on the asphalt surface the whole distance, and accordingly used the coefficient of friction

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<sup>4</sup> *Id.*

for a paved surface, because the coefficient of friction on a grass surface would be lower than on a paved surface and it was impossible to accurately determine how much distance Mr. Talley traveled on the grass after departing the roadway. According to Plaintiffs, Mr. Costanzo's assumption resulted in the *maximum* speed for Mr. Talley, presumably a benefit to Defendants in that Mr. Costanzo's analysis yielded a higher speed than would be yielded had he assumed that Mr. Talley traveled on the grass. Therefore, Plaintiffs ask the Court to deny Defendants' motion and permit Mr. Costanzo to testify as to Mr. Talley's speed.<sup>5</sup>

6. The Court "serves as the gatekeeper for expert testimony."<sup>6</sup> This gatekeeping function requires that the Court only allow a "witness [to] testify as an expert when [the witness is] qualified as an expert and [when] the witness has scientific, technical or other specialized knowledge that will assist the trier of fact[.]"<sup>7</sup> To reach these admissibility determinations, the Delaware Supreme Court has crafted a "five-step test."<sup>8</sup> This test provides that a witness' proffered opinion testimony will be admissible if this Court makes the following findings: (i) the witness is qualified as an expert by

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<sup>5</sup> See Docket 72.

<sup>6</sup> *Potter v. Blackburn*, 850 A.2d 294, 299 (Del. 2004).

<sup>7</sup> *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004). See also D.R.E. 702.

<sup>8</sup> See *Eskin*, 842 A.2d at 1227.

knowledge, skill, experience, training or education; (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (iv) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.<sup>9</sup>

7. In this case, upon review of Mr. Costanzo's "Collision Reconstruction Report," the Court finds his opinions to be reliable. Mr. Costanzo's report reveals a foundation and analysis that is adequate and imparts an objective and sound methodology in the formulation of his opinions. The data and information relied upon by Mr. Costanzo also appears to be the type of information that would be reasonably relied upon by other experts when performing an accident reconstruction analysis. What is more, Mr. Costanzo's opinions are relevant in that his opinions on how and why the accident occurred and which party was at fault will assist the

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<sup>9</sup> *Id.* See also *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993); *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).

jury in understanding the evidence and/or determining a fact in issue.<sup>10</sup> Such testimony will not create unfair prejudice or confuse or mislead the jury.

8. Defendants' arguments regarding the reliability of Mr. Costanzo's opinions, specifically his opinion as to Mr. Talley's speed, goes strictly to the weight of the evidence. The alleged "inconsistencies" between the evidence and Mr. Costanzo's speed opinion, as well as Mr. Costanzo's use of the supposed wrong coefficient of friction, can be brought out during the Defendants' cross examination of Mr. Costanzo in an attempt to impeach his testimony.<sup>11</sup>

9. Based on the foregoing, the Court finds Mr. Costanzo's proffered testimony admissible. Accordingly, Defendants' motion in limine to preclude Plaintiffs' expert, Frank M. Costanzo, from testifying is **DENIED**.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary  
cc: Michael K. Tighe, Esquire  
Michael L. Sensor, Esquire

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<sup>10</sup> See *State v. McMullen*, 900 A.2d 103, 113 (Del. Super. Ct. 2006) (citation omitted) ("[E]xpert testimony must be relevant by requiring that it 'assist the trier of fact to understand the evidence or to determine a fact in issue.'").

<sup>11</sup> Defendants do not appear to question or object to Mr. Costanzo qualifying as an expert. Therefore, the Court assumes that he is qualified as an expert and will not further address his qualifications.